UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KALYN FREE, Plaintiff, v. KEVIN W. DELLINGER, ATTORNEY GENERAL OF THE MUSCOGEE CREEK NATION, in his official capacity; and, JUDGE GREGORY H. BIGLER, in his official capacity, Defendants.	)	Civil Case No. 18-CV-181-CVE-JFJ

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT DELLINGER'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO EXHAUST TRIBAL REMEDIES

COMES NOW Plaintiff, by and through undersigned counsel, and respectfully submits this response in opposition to Defendant Dellinger's Motion to Dismiss Plaintiff's Complaint for Failure to Exhaust Tribal Remedies [Doc. No. 8] and Brief in Support [Doc. No. 9] (herein collectively "Defendants' Motion"). Defendant Dellinger's Motion utterly fails to identify any source of jurisdiction the Muscogee (Creek) Nation (herein "MCN") has over Plaintiff Free, a non-MCN citizen. In opposition to Defendant Dellinger's Motion, Plaintiff states:

INTRODUCTION

The MCN, through Defendant Dellinger, has filed suit against Plaintiff based upon the alleged actions of others—all non-parties to the current action, though named parties in the suit in MCN District Court (herein the "*Muscogee (Creek) Action*")—including Bim

Stephen Bruner, the Kialegee Tribal Town, Red Creek Holdings, LLC, and others. The *Muscogee (Creek) Action* alleges unlawful gaming operations on restricted property in Broken Arrow, Oklahoma. Notably though, Defendants—through their Motion—fail to identify any specific allegations that were leveled against Plaintiff Free.

The *Muscogee (Creek) Action* raises claims for relief for: (1) violation of MCN gaming law NCA 12-184, which compromises the entirety of Title 21 of the MCN Code (herein the "MCNCA"); (2) violation of the Indian Gaming Regulatory Act; (3) violation of the Gaming Compact between the MCN and the State of Oklahoma; and (4) nuisance for violation of MCN gaming law NCA 12-184. The only violative acts alleged by the MCN is that the *development* of the "Red Creek Casino" is not licensed by the MCN.

As noted in Plaintiff's Motion for Preliminary Injunction [Doc. No. 3] the District Court of the MCN clearly lacks jurisdiction. Because Plaintiff is not a member of the MCN and none of the conduct—alleged or actual—of Plaintiff took place in the MCN's jurisdictional boundaries, the District Court of the MCN lacks jurisdiction. Seeking to enjoin this unlawful exercise of jurisdiction, Plaintiff filed this action after seeking relief in the District Court and Supreme Court of the MCN.

Defendant Dellinger contends this action should be dismissed because the Plaintiff has failed to exhaust her remedies in tribal court. Defendant's Motion fails to address any of the reasons why exhaustion is not required, all fully detailed and argued in Plaintiff's Motion for Preliminary Injunction. As argued below (and in Plaintiff's Motion for Preliminary Injunction), exhaustion is not necessary because the *Muskogee (Creek) Action* was brought against Plaintiff in order to harass her and her husband, because Plaintiff lacks

an opportunity to further challenge jurisdiction in tribal court, and because jurisdiction is so clearly lacking that exhaustion would serve no other purpose than to delay.

On the issue of jurisdiction, Defendant Dellinger defends this unlawful exercise of jurisdiction on one singular ground: their exercise of jurisdiction is limited to prohibiting "Plaintiff, and others, from committing 'acts in furtherance of gaming upon the historical reservation lands of the MCN, and protecting such lands from illegal activities.'" Defendant's Motion at 6 (emphasis in original removed). Defendant Dellinger seemingly contends that as long as the action involves "historical reservation lands of the MCN" they are free to haul into their courts any individual regardless of whether they are connected to the property or any illegal conduct. This just simply is not the case and this Court should enjoin their unlawful exercise of jurisdiction over Plaintiff.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

Defendant Dellinger seeks dismissal of this action pursuant to Fed. R. Civ. P. 12(b)(1), which allows for dismissal of actions for lack of subject matter jurisdiction. Generally, "Rule 12(b)(1) motions to dismiss for lack of jurisdiction take one of two forms: (1) facial attacks; and (2) factual attacks." *Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005) (relying on *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995)). Defendant's Motion raises a factual attack because it challenges the facts upon which subject matter jurisdiction depends. *See Holt*, 46 F.3d at 1003. As such, the Court may consider "affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id*.

II. EXHAUSTION OF TRIBAL COURT REMEDIES IS NOT REQUIRED.

Defendant Dellinger seeks dismissal on a single ground: whether Plaintiff exhausted her remedies in tribal courts before bringing this action. Although a defendant in tribal court ordinarily must exhaust his/her jurisdictional challenges in tribal court before seeking relief in federal court, the Supreme Court and the Tenth Circuit have recognized exceptions to the exhaustion requirement under which a defendant may immediately file a declaratory judgment action. These exemptions apply in this current action:

(1) "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;"

(2) "where the tribal court action is patently violative of express jurisdictional prohibitions;"

(3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction;"

(4) "when it is plain that no federal grant provides for the tribal governance of nonmembers' conduct on land covered by the main rule established in *Montana v. United States*;"

(5) It is "clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay"

Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006) (citations, quotations, and alterations omitted). Although raised and argued in Plaintiff's Motion for Preliminary Injunction [Doc. No. 3], Defendant's Motion fails to address or respond to any of these exceptions.

A. The Allegations Against Plaintiff In The Muscogee (Creek) Action Are Meant To Harass Or Otherwise Made In Bad Faith.

The instant action illustrates a textbook example "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith." *Burrell*, 456

F.3d at 1168. Here, there are no allegations leveled against Plaintiff so as to apprise of the allegedly offending conduct. Instead, there is the generalized contention that Plaintiff "individually enabled and/or participated in the development of Red Creek Casino." *See* Doc. No. 3 at Exhibit 1, Amended Complaint. To the extent this austere statement is construed as an allegation against Plaintiff, it fails to meet the necessary pleading standard, "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (citing *Conley v. Gibson*, 355 U.S. 41, 47) (internal citation and alteration omitted). While a complaint need not have detailed factual allegations, something more than mere labels, conclusions, and formulaic recitations are needed. *Id.* The Supreme Court, in adopting the *Twombly* standard, expressly noted the significance of Fed. Civ. Pro. Rule 8 to preclude "a plaintiff with a largely groundless claim be[ing] allowed to take up the time of a number of other people." *Id.* at 557-558 (internal citations and alterations omitted). Rather than haling Plaintiff into court for *her* alleged actions, it seems that MCN haled Plaintiff—a non-tribal member—into tribal court for the *alleged* actions of her husband. *See* Doc. No. 3 at Exhibit 1, Amended Complaint (noting that Plaintiff Free is the spouse of Bim Stephen Bruner). It is clear that the MCN seeks to harass Plaintiff and has proffered no particularized allegations against her. Accordingly, Plaintiff need not be forced to slog through tribal court proceedings intended only to harass and embarrass.

B. Plaintiff Lacks An Adequate Opportunity To Challenge Jurisdiction In Tribal Court.

As noted above, exhaustion is not required "where exhaustion would be futile

because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction." *Burrell*, 456 F.3d at 1168. Here, Plaintiff lacks an adequate opportunity in a tribal forum to challenge the MCN's jurisdiction. Plaintiff was served with process regarding the Tribal Complaint on or about November 8, 2017. On November 15, 2017, before the Plaintiff to this action could even file a responsive pleading in Muscogee Nation District Court, the MCN sought a stay of the Tribal Complaint, which Defendant Bigler temporarily granted the following morning, pending hearing on the stay, which subsequently occurred and a stay was formally granted. As a result of this stay, Defendant Bigler has refused to consider Plaintiff's Motion to Dismiss the Tribal Complaint on jurisdictional grounds. Simply put, Defendants' actions denied, and continue to deny, Plaintiff an opportunity to adequately challenge the MCN's jurisdiction. Subsequently, out of respect for the tribe's authority and sovereignty, and while remaining in a state of legal limbo, Plaintiff applied to the MCN Supreme Court for writs of mandamus and prohibition so that Plaintiff would be dismissed from the *Muscogee (Creek) Action*. Doc. No. 3 at Exhibit 3, MCN Writ Application. However, the MCN denied Plaintiff's requested writs. Doc. No. 3 at Exhibit 4, MCN Order Denying Writs.

Defendant Dellinger contends that Plaintiff should have moved to lift the stay in the *Muscogee (Creek) Action* before bringing this action. *See* Defendants' Motion at 3. However, considering Defendant Bigler's previous refusal to consider hearing Plaintiff's Motion to Dismiss, such an act seems futile and its suggestion is merely pretext to garner a dismissal in this action. In actuality, the only potential tribal remedy available to Plaintiff in tribal court is her remaining in a state of flux while the *Muscogee (Creek) Action* is

indefinitely stayed.

C. Lack Of Jurisdiction Is So Clear That Exhaustion Is Not Required.

Finally, exhaustion is not necessary here because "the tribal court action is patently violative of express jurisdictional prohibitions" and it is "clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay." *Burrell*, 456 F.3d at 1168. Indian nations are "distinct, independent political communities, qualified to exercise many of the powers and prerogatives of self-government." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (internal quotation omitted); *McKesson Corp. v. Hembree*, 2018 U.S. Dist. LEXIS 3700 at *9 (N.D. Okla. Jan. 9, 2018) (finding lack of tribal court jurisdiction where pharmaceutical distributors distributed products within the tribe's jurisdictional area). The "sovereignty that the Indian tribes" enjoy "is of a unique and limited character, … center[ed] on the land held by the tribe and on tribal members within the reservation." *Plains Commerce*, 554 U.S. at 327 (quotations omitted); *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *9. Thus, "tribal jurisdiction is … cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris*, 569 F.3d at 937-38. In fact, the "[e]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981). Due to this restriction on tribal governance, neither a "tribe's adjudicative jurisdiction," nor tribal courts are "of general jurisdiction." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1151 (10th Cir. 2009) (internal quotation omitted).

The Supreme Court has held that, except in limited circumstances, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565; *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *10. In fact, "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid." *Plains Commerce*, 554 U.S. at 330 (quotations omitted); *see also Strate v. A-1 Contractors*, 520 U.S. 436, 445 (1997). The *Montana* rule extends to tribal regulation over non-Indians even within Indian country. *See e.g. McKesson Corp*, 2018 U.S. Dist. LEXIS 3700 at *18. As discussed below, the *Montana* rule is subject to two exceptions, neither of which are applicable here. Even so, these two exceptions are "limited . . . and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce*, 554 U.S. at 3337 (citing *Montana*, 450 U.S. at 564) (internal quotation and citations omitted).

i. Plaintiff Has Not Entered Into A Relationship With The MCN Such That The MCN Would Obtain Jurisdiction Over Them.

Under the first exception, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (internal citations omitted); *McKesson Corp.*, 2018 U.S. Dist. LEXIS 3700 at *19. The underlying principal of this exception lies in the fact that, because non-tribal members "have no say in the laws and regulations that govern tribal territory[,] . . . those regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the

tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce*, 554 U.S. at 337 (citing *Montana*, 450 U.S. at 564); *McKesson Corp*., 2018 U.S. Dist. LEXIS 3700 at *19. Plaintiff has not entered into any relationship with the MCN, much less a relationship which would trigger this exception. MCN has not even alleged otherwise.

The allegations against Plaintiff—to the extent there are any—within the *Muscogee (Creek) Action* are insufficient to trigger this exception. The amended complaint notes that Plaintiff Free is the spouse of Mr. Bruner—a fact Plaintiff readily admits. *See* Doc. No. 3 at Exhibit 1, Amended Complaint at 2. Plaintiff has not "gamed" in any unlicensed facilities and the MCN does not allege otherwise. Plaintiff does not own or operate any unlicensed (or licensed) gaming devices or gaming facilities and the MCN does not allege otherwise. Notably, the MCN has not alleged that *any* unlicensed gaming has occurred. It is entirely unclear what "violation" has occurred and, to the extent there was a violation, it is unclear what role Plaintiff had in it. Instead, the "allegations" against Plaintiff are limited to: 1) Plaintiff "enabled and/or participated" in some nebulous and undefined and undescribed violative act; and 2) Plaintiff is married to someone who somehow "act[ed] in furtherance of gaming activities" that are not licensed by the MCN. *Id.* at 3. As Plaintiff is not a member of the MCN, *any* attempt by the MCN to exert jurisdiction over her is *presumptively invalid* and MCN's austere "allegations" are insufficient to overcome this presumption. *See Plains Commerce*, 554 U.S. at 330.

ii. The Alleged Conduct Does Not Threaten The Subsistence Of The MCN.

The second exception to the *Montana* rule provides that a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566 (internal citations omitted). This exception is intended to allow the tribe to target conduct that directly threatens or impacts "the right of reservation Indians to make their own laws and be ruled by them." *Strate v. A-1 Contrs.*, 520 U.S. 438, 459 (1997) (internal quotation omitted); *McKesson Corp*., 2018 U.S. Dist. LEXIS 3700 at *24. As a result, the exception is narrow and applies only to conduct that "imperil[s] the subsistence of the tribal community," *Crowe & Dunlevy*, 640 F.3d at 1153 (quoting *Plains Commerce Bank*, 554 U.S. at 341), and cannot extend "beyond what is necessary to protect tribal self-government or to control internal relations," *Strate*, 520 U.S. at 459. Additionally, the non-tribal member's conduct must be "catastrophic for tribal self-government." *Plains Commerce Bank*, 554 U.S. at 341 (internal quotation omitted).

It presses the bounds of reason for the MCN to contend that their attempted—and ongoing—exercise of jurisdiction over Plaintiff is "necessary to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. at 564; *Strate*, 520 U.S. at 459. Indeed, this exception "envisions situations where the conduct of the nonmember poses a direct threat to tribal sovereignty." *Philip Morris*, 569 F.3d at 943. Generalized allegations of harm which exist for all members of society are, by themselves, insufficient to justify *Montana's* second exception. *See McKesson Corp., et al. v. Hembree, et al.*, 2018 U.S. Dist. LEXIS 3700 at *29 (Okla. N.D. Jan. 9, 2018). Instead, the complained-of

conduct must truly be "catastrophic" to the tribe's very existence or stability. *See id.* (citing *Plains Commerce Bank*, 554 U.S. at 341).

Even *if* Plaintiff participated in some—or even all—of the complained-of conduct, MCN has provided no support for the notion that the conduct threatens the very existence and political stability of the Nation. That is what is required to satisfy *Montana's* second exception. Instead, by Defendant's own admission, through the *Muscogee (Creek) Action*, the "MCN simply seeks to protect its own sovereignty over said parcel and enforce its own licensing procedures, gaming laws and its gaming compact with the State of Oklahoma." Defendant's Motion at 6 (emphasis omitted). This case has nothing to do with the internal relations and structures of the MCN—but is limited to sovereignty over a single parcel of land and a desire to enforce its own gaming licensing—and, as such, the Tribe has no jurisdiction over nonmembers' alleged actions which do not relate thereto.

III. MCN JURISDICTION OVER PROPERTY DOES NOT EXTEND TO UNASSOCIATED PARTIES.

Defendant Dellinger makes only one argument relating to their jurisdiction in the *Muskogee (Creek) Action*:

> the relief sought by MCN is narrowly tailored to prohibit Plaintiff, and others, from committing "acts in furtherance of gaming upon the historical reservation lands of the MCN, and protecting such lands from illegal activities." By all accounts, the Bruner Parcel is within the restricted historical reservation land of the MCN. Through its Tribal Court Complaint, MCN simply seeks to protect its own sovereignty over said parcel and enforce its own licensing procedures, gaming laws and its gaming compact with the State of Oklahoma. Jurisdiction over the land in question is a matter solely within the province of the Muscogee (Creek) Nation and this Court should honor that sovereignty.

Defendants' Motion at 6 (emphasis omitted). This seems to be a reliance on a tribe's

"power to exclude non-Indians from Indian lands." *McKesson*, 2018 U.S. Dist. LEXIS 3700 at *27 (quoting *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1244 (10th Cir. 2017)). However, even assuming the MCN has jurisdiction over the Bruner parcel, that does not mean jurisdiction is extended to Plaintiff or any other non-tribal member not involved with the parcel.

If the Court were to accept the MCN's claim of jurisdiction here, the MCN could theoretically have jurisdiction over any non-tribal member just because the action involves restricted property—regardless of how tenuous the individual's connections are to the subject property. Defendants fail to even attempt to link Plaintiff's conduct to regulation of the Bruner parcel. Analogized: a plaintiff cannot make a claim for trespass then fail to plead how the defendant trespassed.

As noted above, the Bruner parcel is restricted property in Broken Arrow, Oklahoma. Plaintiff has no interest or control over the property.[1] As such, if MCN is simply interested in "protecting such lands from illegal activities," the exercise of jurisdiction here is unwarranted. Plaintiff has no legal say is what activities occur or do not occur on the subject property. Ultimately, allowing the MCN interpretation—which would allow jurisdiction over almost anyone—would "swallow the [*Montana*] rule or severely shrink it," and, as such, must be rejected. *Plains Commerce*, 554 U.S. at 330. Accordingly, the Court should deny Defendant's Motion to Dismiss and enjoin Defendant

[1] Defendant Dellinger contends they cannot test the veracity of this assertion, but the item is a matter of public record and Defendants—if they have not already—could easily obtain a copy of the land records from the County Clerk. In fact, they should have checked land records before even filing suit against Plaintiff.

from exercising its unlawful jurisdiction over Plaintiff.

CONCLUSION

Defendant Dellinger's Motion to Dismiss fails to consider well-recognized exceptions to the general requirement that a party exhaust tribal remedies before seeking redress before federal courts. Exhaustion is not required here because the action filed against Plaintiff was filed to harass Plaintiff. Additionally, exhaustion is also not required because the Muskogee (Creek) Nation's lack of jurisdiction over Plaintiff is so clear that exhaustion would serve no other purpose but delay. As such, the Court should DENY Defendant Dellinger's Motion to Dismiss, GRANT Plaintiff's Motion for Preliminary Injunction, and ENJOIN Defendants from exercising jurisdiction over Plaintiff and dismiss the claims against her in Muscogee (Creek) Nation District Court.

Respectfully submitted,

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By: ***/s/George M. Miles***

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 11 May, 2018, a true, correct, and exact copy of the foregoing document was served *via* electronic notice by the CM/ECF filing system to all parties on their list of parties to be served in effect this date.

By: ***/s/George M. Miles***
George M. Miles